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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

BUCH EXPRESS, INC., PETITIONER

v.

THE UNITED STATES, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Comes now Buch Express, Inc., of Harrisburg, Pennsylvania, a motor common carrier of property in interstate commerce, and respectfully prays that a writ of certiorari issue to review the judgment and orders of the Court of Claims entered in the above-entitled case on July 12, 1955, November 8, 1955, and January 2, 1956, and, if deemed appropriate and desirable by the Court, that this proceeding be set down for argument along with No. 559, October Term, 1955, *United States* v. *Western Pacific R. Co. et al.*, certiorari granted January 23, 1956, for the reasons hereinafter stated.

OPINION BELOW

The only opinion of the Court of Claims is dated July 12, 1955 (App. B, pp. 20-28) and is reported at 132 F. Supp. 473.

JURISDICTION

The judgment of the Court of Claims denying the petition in that court was originally entered on July 12, 1955 (App. B., p. 28.) A timely motion for a new trial, amendment of the findings, and for rehearing was denied November 8, 1955 (R. 154),[1] and a motion for reconsideration of said order of November 8, 1955 was denied by the Court of Claims January 20, 1956 (R. 155). The jurisdiction of the court below was based on 28 U.S.C. 1491; the jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTIONS PRESENTED

1. Whether the court below erred in construing the classification tariff without reference to, and in disregard of, the purpose of such classification, namely the grouping of articles *according to their transportation characteristics,* and without determining and applying in connection therewith the value, risk, special-handling and similar characteristics of the commodity involved, in relation to and in furtherance of such purpose of just classification.

2. Whether the more specific, double-first class classification rating provided for range or height finders

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[1] References in this petition to the numbered pages of the certified record of petitions, orders, motions, and supporting and related papers are designated as "R. —," and references to the transcript of hearings before the Court of Claims commissioner as "Tr. p. —."

and scientific instruments, commodities of restricted function, extraordinary value, and utilizing scientific methods and processes to accomplish their purposes, or the first-class rating applied generally on radio and electrical appliances and instruments moving in commerce, should be applied on shipments of searchlight-laying radar the sole purpose, function, and design of which was for range-finding, and the value, risk, and similar transportation characteristics of which were extremely unfavorable from the carrier point of view.

STATUTE INVOLVED

Section 216 (b) of the Interstate Commerce Act, 49 U.S.C. 316 (b), providing for the establishment, observation, and enforcement by common carriers by motor vehicle of just and reasonable classifications, and Section 217 (b), 49 U.S.C. 317 (b), prescribing the duty of the carriers to apply such filed classification tariffs, are set out in Appendix A, *infra*, p. 19.

STATEMENT

Petitioner's predecessor transported numerous truckload shipments of searchlight-laying radar from Lake Success, N. Y. to Baltimore, Md. during 1945 under conditions of hostilities. Twenty of these are involved in the present action. There was no specific description "radar" in the tariffs or classification. (Finding 5, R. 94.) Some secrecy as to the true identity of the shipments was required for reasons of security. (Finding 10, R. 102.) The shipments were accordingly described on the bills of lading prepared by the Army personnel (R. 92) as radios, echelon spares, and echelon parts (Finding 2, R. 94), but were billed by petitioner's predecessor and paid for in the first instance by the

Government on the basis of the double-first class rating provided for scientific instruments not otherwise indexed. (Finding 3, R. 94.) Later the Government made deductions against other monies owing petitioner, then claiming the first-class rating provided for radios to be applicable. (Finding 3, R. 94.) The amount claimed by petitioner on the twenty shipments is $2,986.34 (Finding 13, R. 105). Petitioner also has claims in process on other shipments of the same movement. Its total claims were estimated at $25,000 Tr. p. 21.[2]

The classification and exceptions tariff provisions involved are filed subject to the Interstate Commerce Act and are set forth *in extenso* in findings 6 and 7. (R. 94-100.) These provide three possible descriptions for the radar set: under the generic heading "Drawing Instruments, Optical Goods or Scientific Instruments," a double-first class rating for both "Range or Height Finders" and "Scientific Instruments [not otherwise indexed]"; and under the generic heading "Electrical Appliances or Equipment or Parts Named," a first-class rating on "Radio Transmitting and Receiving Sets combined." (R. 97.) These ratings appear in the National Motor Freight Classification of the trucking industry, and by virtue of the Middle Atlantic Conference exceptions tariff, which takes precedence as to overlapping items, the ratings here involved are all to be treated as any-quantity ratings. (R. 98.)

The shipments in question consisted of radar set AN/TPL-1, parts therefor, and equipment and tools used in its operation and maintenance. (Finding 4, R. 94.) This is a detecting and ranging device based on

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[2] "Tr. p. —" refers to transcript pages of the Court of Claims hearings.

use of reflected propagated impulses. (R. 100, 125.) At the hearing before the Court of Claims commissioner, the petitioner relied for the technical material on War Department Technical Manual 11-1352 (the Government's exhibit 3 of record) and made extensive showing that the sole purpose and function of the radar set was range and height finding, which was wholly undisputed.[3] Tr. pp. 41-44, 133, 143, 146-147, 151-152; Plaintiff's ex. 3, *passim*. The set embodies and utilizes radio, optical,[4] and other electronic principles. The unique, multicircuit, Synchronizer System is the heart of the radar set, coordinating its transmission, receiving, calibrating, and preentation units. (R. 123-124, Def.'s ex 3, pp. 16-17.) *Radio parts as such constitute less than ten percent of the complete radar assembly.* (Tr. p. 114.)

The value of the radar sets as they moved was "extremely high." (Tr. p. 16.) They always moved under seal, placed there by representative of the Sperry Gyroscope Company (the Government contractor) at the origin point and removed by War Department representatives at destination, which was not the ordinary practice on Government freight even in wartime. (Tr. p. 17.) Petitioner's predecessor was re-

[3] The Technical Manual describes the purpose of the radar set to be—"To search the skky for enemy aircraft and, when found, to indicate their position. Position data is furnished as slant range (distance in yards) and as azimuth and elevation (angular directions in mills). The radar set also computes target altitude in feet . . ."; "To furnish target-position data to an anti-aircraft searchlight so that the beam of the searchlight, when switched on, will strike the target . . ." (Finding 9, R. 100.)

[4] The radar embraces a telescopic component, used primarily for orientation of the set in synchronization with releated searchlight. (Def.'s ex. 3, pp. 12, 67.)

quired by the Government to carry special excess-value cargo insurance for this movement. It was under strict instructions to protect the load, and was subject to other special directives all designed to further both the security and safety aspects of these highly valuable shipments. (Tr. pp. 9-12, 16-18 inclusive.)

On its brief and exceptions the petitioner argued to the Court of Claims that "the transportation characteristics of the Radar Sets in question such as its extremely high value (of unknown limits), limited specialized use and construction, and requirements of special precautions and arrangements for protection of the cargo, as well as compliance with security demands, place it in a higher class and classification of commodities than Electrical Appliances, Radios and similar items." (R. 57). However, in its opinion dated July 12, 1955, the court below ignored these facts and considerations, *even though they were fully discussed on oral argument before it.* Instead, the court held that petitioner failed to sustain its burden of proof, relying mainly on an inapplicable informal opinion of the National Classification Board,[5] which administers the motor classification, and on an assumption of the non-precision nature of the radar set squarely inconsistent

[5] On March 23, 1948 this Board ruled that *the radar in issue* should be rated double-first class, as a range and height finder, which ruling stood unchanged until September 18, 1953, when the Board (after a change of membership) issued a general opinion, not based on inspection or study of AN/TPL-1 (tr. p. 203), applying the radio rating to the radars inspected, but holding that "Electrical Appliances or Instruments [not otherwise indexed]" should apply to radars moving prior to Nov. 15, 1953. In contrast to the 1948 ruling, this did not treat AN/TPL-1 specifically. (Finding 12, R. 104.)

with at least one of its own basic findings (No. 9, R. 101).[6]

Thereupon petitioner presented by motion for new trial, with affidavits, the following detailed facts, *inter alia:*

> That the indicated value per pound of the radar set was in excess of $20 per pound, in contrast with contemporaeous movements of radio, which averaged less than $5 per pound at the time. (R. 116.)
>
> That the Government required the carrier to increase its cargo insurance coverage from $50,000 to $250,000 per load for the traffic, at considerable expense to the transporting carrier. (R. 116.)
>
> That certain of the radar set's essential components are unique to radar and distinguish it from all radio communicating equipment: the antenna pedestal, the synchronizer, the main drive assembly, and the visual presentation system. (R. 122.)

Petitioner offered expert evidence on these points of the highest caliber, including the engineer responsible for the original electrical design and production of the set during 1945. (R. 122.) This affiant stated:

> "All of these differences in design and construction between the radar set and radio transmitting and receiving sets reflect the difference in function between the two. Radar is primarily a range-

[6] Although the court's opinion compares the searchlight-laying radar to a jeep with respect to its transportation on its own wheels (opinion, *infra*, p. 27), Finding 9 reads in part: "The cabinet is not spring supported upon the wheels and therefore, must NOT [sic] be towed on its own wheels by another vehicle." R. 101.

finding device. Radio is an instrument of communication . . . It is, therefore, accurate to describe this radar as a precision-type device from a technical point of view."

"In the trade, radio is a term which applies to a device which is used primarily in communication, whereas the term radar applies to a device which obtains electronically range and bearing by the use of reflected propagated impulses." (Venaglia, R. 124-125.)

Upon denial of this motion without opinion, petitioner again sought reopening in a motion for reconsideration, urging on the court direct conflict between its refusal to consider transportation factors and the relation between the set's demonstrated special function, use and design and its just treatment for transportation rating purposes, on the one hand, and the established principles and criteria of this Court and of the Interstate Commerce Commission, on the other. The petitioner took the position that "substantial justice (as well as the legal precedents) entitle it to one more hearing of its position, in view of the special circumstances here" (R. 157), referring primarily to the novelty, the difficulty, and the technical nature of the particular question involved and the need for expansion of the record on these transportation aspects, in the interest of justice. Nevertheless, this motion was also denied without opinion, and the question thus squarely presented to this Court as matter of law whether or not the Court of Claims erred in refusing to hear or consider all the *transportation* facts and circumstances (including the technical electronics aspects illuminating and explaining these) thus consistently offered and urged by petitioner throughout the case, and to construe the classification tariff involved

in the light thereof, to the end of furthering and protecting *just* classification application in accordance with the Interstate Commerce Act.[7] This question is both fundamental and far-reaching in national transportation law.

REASONS FOR GRANTING THE WRIT

Petitioner submits that review should be granted, and a writ of certiorari issue in this case for three reasons. The rulings of the court below are in direct conflict with the basic purpose and nature of regulated-carrier freight classification as established by this Court in *Director-General* v. *Viscose Co.*, 254 U.S. 498. They are also inconsistent with the first cardinal interpretation principle of the Court in *United States* v. *Gulf Refining Co.*, 268 U.S. 542. Finally, this case is of unusual importance in the field of transportation law, since it presents a question of *motor* freight classification, presumably for the first time here, in connection with the new and important category of electronics instrumentalities and devices which are now moving increasingly in commerce.

1. *Conflict with Director-General* v. *Viscose Co.*, 254 U. S. 498. This Court held and declared in the *Viscose Co. case, supra,* that for transportation purposes "Classification in carrier rate-making is grouping, the assorting in a designated list, commodities which, be-

[7] While the court below, in the concluding paragraph of its July 12, 1955 opinion, uses the language "considering the transportation characteristics involved," it is clear that this was *pro forma* only, since there is no discussion or consideration whatever of *any* of the individual transportation elements which petitioner urged upon it, namely the extremely high value and risk, the requirement of special care and precautions in handling, and other unfavorable characteristics as contrasted with the generality of traffic, in any part of the opinion or decision.

cause of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, and the like, may justly and conveniently be given similar rates." 254 U.S. 503. Accord: *Class Rate Investigation, 1939*, 262 I.C.C. 447, 508. cf. *Louisville & N. R. Co.* v. *United States*, 109 F. Supp. 464, 465 (W.D. Ky.), affd. 217 F. 2d 307 (C.A. 6).

It is axiomatic that a classification tariff filed pursuant to the Interstate Commerce Act has the full force of statute and must be so construed as to effectuate this basic purpose of just classification. The serious error of the decision of the court below is that, by refusing to give any consideration whatever to the essential elements that pertain to the inherent purpose of the classification involved, that is, to "the inherent quality or value," to "the risks involved in shipment," to "the manner in which they are shipped or loaded, and the like," the court in effect overlooked the purpose of the classification and violated the principle of this Court's decision, which principle is indispensable to the just application of such classification provisions in appropriate cases, such as the case at bar. These elements were sufficiently proven at all stages of the record from the hearing onward, to permit and require their application as compelling criteria in the determination of the question whether the searchlight-laying radar involved was to be treated for transportation purposes as an ordinary, generally-moving radio or electrical appliance or instrument, on the one hand, or a restricted-use, extraordinary, unusually unfavorable, item of commerce comparable with other scientific in-

struments on the other. The radar was of "extremely high value" (tr. p. 16), a fact never herein disputed.[8] The Government had exclusive use of the vehicles used, which were under seal at all times, but the carrier had the risk, the high cargo insurance requirement, and the unqualified duty to take special care and precautions both for its physical protection and all-important security reasons. (Tr. pp. 16-18.) When the national motor freight classification provisions are read with these factors in mind, the possibility of reasonable application of the ordinary first-class basis of ratings to this special-type traffic and movement entirely disappears.[9]

The court below thus denied effect, without any legal cause or justification, to the declared purpose for which the classification provisions were established, and by the same token it contravened the vitally important principle of *Director-General* v. *Viscose Co.*, 254 U.S. 498, *supra.*

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[8] The record shows indicated values for the searchlight-laying radar in excess of $20 per pound, as of the time of movement, which contrast with comparable values for "radio" averaging less than $5 per pound at the time. (R. 116.)

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[9] If specific description and rating for "radar" had been provided, these transportation criteria would have been less applicable, if at all, regardless of the level of the rating, which would then have been subject to scrutiny only on the issue of reasonableness. However, it cannot seriously be contended that the term radio means radar in ordinary lay usage, as well as in the commercial world, as "rate and tariff items are promulgated for laymen to use in the ordinary course of business affairs. The construction given should have a practical and ready application." *West Coast Products Co.* v. *Southern Pacific Co.*, 226 F. 2d 830, 833 (C.A. 9). Petitioner shows in the following paragraph that the specific term of ordinary usage most appropriate for AN/TPL-1 is "Range or Height Finder," which also accords fully with these transportation criteria.

2. *Inconsistency with United States* v. *Gulf Refining Co., 268 U.S. 542.* Another fundamental principle of this Court's decisions is that: "Where a commodity shipped is included in more than one tariff description, that which is more specific will be held applicable." *United States* v. *Gulf Refining Co.,* 268 U.S. 542, 546. The holding of the court below that the searchlight-laying radar is to be treated for transportation purposes as radio, and not as a range or height finder and a scientific instrument clearly violates this principle, the reason for which is not only to secure definiteness and to eliminate discrimination from loose and variable application of carrier tariff provisions but also to reinforce the basic purpose and *raison d'être* of classifications by reflecting as fully as possible the inherent, individualizing aspects of each commodity as it moves in commerce, in the interest of just relationships. Accordingly, when the court below overlooked the fact (as contained in its own basic finding—No. 9, R. 100, *supra*) that the sole purpose of the radar here was the limited one of detecting and ranging objects in the sky, i.e. finding range and/or height, and ignored petitioner's expert showing that each and every unique factor of the design and construction of the set reflected this purpose, which was thus translated into concrete high-value, risk, and physical-handling characteristics (see R. 57, 140-141, 163-165), it definitely contravened the cited principle of the *Gulf Refining Co.* case, *supra.*

Actually, this particular radar set was as matter of law both a range or height finder, and a scientific instrument under the definition of the Court of Claims itself, in *Erie R. Co.* v. *United States,* 79 C. Cls. 102, 107 (involving bomb sights): "If the article in its make-up and functioning qualities is in fact an instrument which

was intended to and does overcome the handicaps incident to another factor with which it is to be used in ascertaining range and distance, and thus the creator of the article utilizes scientific methods and processes to accomplish the purpose, it is difficult to classify the same on any other basis than analagous, to say the least, to scientific instruments."

The term "Range Finder" is applied to detecting and ranging devices using electronic principles and techniques. 18 Enclyclopedia Britannica 973 (1954 ed). The mere fact that at an earlier time most range finders were optical instruments only does not preclude the just and expansive application of the specific description "range or height finders" to an instrumentality combining both electronics and optical aspects, where the transportation characteristics justify such application.[10] Classification descriptions are not rigid, or stagnant—they too grow and expand with the natural development of industrial and scientific techniques.[11] The terms scientific instrument and range or height finder thus apply *more specifically* to the searchlight-laying radar at bar than any other term, under the cited

[10] See *Bausch & Lomb Optical Co.* v. *New York Central R. Co.*, 188 I.C.C. 794 (the double-first class rating held justified on range finders as of 1932).

[11] As in effect held by the Court of Claims itself in the recent case of *W. T. Cowan, Inc.* v. *United States*, 127 F. Supp. 550 ("Cannon Amunition" expanded to include 20-millimeter ammunition, formerly considered for "Small Arms").

principle of the *Gulf Refining Co.* case, *supra.*[12]

A supporting principle of construction which the court below did cite, but which it erroneously misapplied, is the principle that "The use to which a commodity is put may be considered in determining the identity thereof." *Classification of Airplane Seats,* 266 I.C.C. 702, 705. Accord: *Union Pacific R. Co.* v. *United States,* 91 F. Supp. 762 (Ct. Cls.), *A. T. & S. F. R. Co.* v. *United States,* 101 F. Supp. 78 (Ct. Cls.), *Aerovias S. A.* v. *A. C. L. R. Co.,* 286 I.C.C. 85 (THE JEEP CASES). Cf. *Motor Cargo, Inc.* v. *United States,* 124 F. Supp. 370 (Ct. Cls.—direction finder parts held anti-aircraft directors by reason of their function and use). As applied to the present facts this principle reinforces the applicability of both the double first-class ratings relied on, reflecting the limited, high-quality, usefulness and other special characteristics of the item.

3. *Importance of this Case.* This case presents to the Court, for what we believe is the first time, the problem of just and proper interpretation of the national *motor freight classification.* It presents the problem of correct application of such classification and its provisions to the newer electronic items now moving increasingly in commerce. It presents to the Court a glaring instance where the failure to apply the lawfully applicable principles and considerations of just classification have produced a result which flies in the face of substantial justice, in a case of considerable and far-reaching

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[12] The radar here involved is no more to be considered a radio for practical purposes than is a motor vehicle an "internal combustion engine," merely because it embraces some of the parts and principles of radio. Similarly, the term radio does not include television. *Dunn* v. *Lahotski,* — I.C.C. —, Dec., Jan. 4, 1956, on reconsideration.

effect. The failure to apply as determinative criteria in such connection the compulsive transportation elements of extremely high value and risk, requirement of special precautions and handling, cargo insurance, and other special factors of like effect, if extended to other situations of this general type, could well undermine the sound administration and interpretation of the Interstate Commerce Act. Such transportation facts are the very stuff of justice in these practical transportation situations, and under the circumstances this Court should recognize their importance and determine and declare their clear applicability in unequivocal and indellible terms, in the interest of *truly just classification.*

There are two further reasons for the importance of this case. First, the rulings of the court below overrule and reverse *sub silentio* important decisions of the Interstate Commerce Commission which are indistinguishable in principle from the instant case, decisions of broad scope and far-reaching effect which reflect broad policies in the administration of regulatory law with respect to commodity classification. In *Scheidel & Co.* v. *Chi. & N.W. R. Co.,* 11 I.C.C. 532, and *Meyer & Co.* v. *A.T. & S.F. Ry Co.,* 41 I.C.C. 381, the double-first class rating of scientific instruments was applied on shipments of various electrical and related parts, shipped in separate boxes and crates, against the contention that the lower Electrical Appliance and similar ratings should apply, in recognition of the limited production, ability of the items to bear a higher charge, and the fact that, "Although separate, prepared for shipment as constituent parts, their identities are merged for the purpose of classification into the complete article" (41 I.C.C. 381), of resulting higher value

and rating. Cf. *Dresser-Stacey Co.* v. *A. & S. R. Co.*, 291 I.C.C. 677 (similar holding as to unity and higher rateability of power pump outfits).

Second, the issue of tariff construction presented is the same (although to be applied in the reverse aspect) as the second issue presented by the Government to this Court in No. 559, October Term, 1955, *Western Pacific R. Co., supra,* in which certiorari to the Court of Claims was granted on January 23, 1956. That case involves application of higher-level rates provided by the railroads for shipments of explosives and other dangerous articles against a contention of the Government (the shipper) that some lower-rated description should apply because in fact the shipments were not explosive nor were they dangerous (because not completed), i.e. that the actual transportation characteristics required a construction less favorable to the carrier.[13] Since the case at bar presents the exact converse of the situation thus presented, and the basic premise of petitioner's position here is fair and just treatment of itself and of all parties to transportation contracts *on the equitable basis of the transportation facts as they apply,* it would appear appropriate and desirable, as well as in the interest of justice and sound application of the Interstate Commerce Act, for the Court to consider these two cases together, thus dealing with this issue in *both* of its significant aspects.

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[13] See Government's petition, December, 1955, pp. 19, 20-21.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SAMUEL W. EARNSHAW,
Attorney for Petitioner

April 19, 1956.

APPENDIX A

Part II. Interstate Commerce Act

SECTION 216

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

SECTION 217

(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: *Provided,* That the provisions of sections 1 (7) and 22 of part I shall apply to common carriers by motor vehicles subject to this part.

APPENDIX B

Opinion of the Court Below

LARAMORE, *Judge*, delivered the opinion of the court:

This is an action by a trucking company to recover transportation charges for certain shipments of radar equipment based on the rate applicable to "Range or Height Finders" or "Scientific Instruments," rather than the rate applicable to radio equipment.

The question presented is whether the radar equipment shipped should be classified, for transportation rate purposes, under the general heading of "Electrical Appliances or Equipment," as "Radio Transmitting and Receiving Sets Combined," which carried the first class rate, or under the general heading of "Drawing Instruments, Optical Goods or Scientific Instruments," either as "Range or Height Finders," or as "Scientific Instruments, N. O. I.,"[1] both of which carry double the first class rate.

Plaintiff, a Pennsylvania corporation, is the successor in interest to a partnership motor common carrier which carried the shipments involved in this case. These shipments were made by the War Department (now the Department of the Army) during the period March 20, 1945 to June 21, 1945, from Lake Success, New York, to Baltimore, Maryland, and consisted of certain radar sets, designated "AN/TPL-1" by the Army, with parts, equipment and maintenance tools therefor.

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[1] Not otherwise indexed.

A radar set is an electrical apparatus which operates by sending out radio (electromagnetic) waves. When these waves hit an object they are reflected ("bounce") back to the set, where, by a cathode ray tube, they appear as pictures ("blips") on a receiving screen. Since the speed of the radio waves is constant and known, the distance of the object from the set can be measured by measuring the time lapse between the sending and the receiving of the radio waves, but since radio waves travel at a tremendous rate of speed (186,000 miles per second) this measurement is only approximate.

Radar Set AN/TPL-1 was a mobile, compact, lightweight radar unit designed for use with an anti-aircraft searchlight. Among its general functions was that of searching the sky for enemy aircraft, and, when found, to indicate their position by furnishing the slant range (distance in yards), and azimuth and elevation (angular directions in Mils). The set also computed the target altitude in feet. Its maximum slant range was 60,000 yards. The data so determined would be furnished to the operators of an anti-aircraft searchlight so that they could direct the beam of the searchlight when turned on to strike the target. The set could then be used to search for a second target while the searchlight followed the original target.

Plaintiff's predecessor participated in a national trucking organization which published a tariff known as "National Motor Freight Classification No. 7, C. F. Jackson, Agent's MF-I. C. C. No. 14," and which contained ratings on all articles usually shipped over the

lines of motor carriers in interstate commerce. The ratings here relevant are as follows:

Item	Article	Ratings
	DRAWING INSTRUMENTS. OPTICAL GOODS OR SCIENTIFIC INSTRUMENTS —Continued:	
17	Range or Height Finders, with or without stands, in boxes and crates	D1
*	* * * * * *	*
21	Scientific Instruments, N. O. I., in barrels or boxes	D1
*	* * * * * *	*
	ELECTRICAL APPLIANCES OR EQUIPMENT OR PARTS NAMED—Continued:	
38	Radio Transmitting and Receiving Sets combined, in boxes or crates	1

The designations "1" and "D1" mean that the first-class rate and double the first-class rate, respectively, are applicable to the items listed. These rates are translated into money by means of another tariff, issued by the Middle Atlantic States Motor Carrier Conference, Inc., in which plaintiff's predecessor also participated, and known as "Exceptions to National Motor Freight Classification No. 7, East, Freight Tariff No. 10-D, MF-I. C. C. No. 6." This tariff gave the first-class rate as so many cents per 100 pounds of the article shipped, and double the first-class rate as twice as much. The first-class rate applicable during the period here involved for shipments from Lake Success, New York, to Baltimore, Maryland, was $1.09 for 100 pounds prior to May 14, 1945, and $1.115 per 100 pounds thereafter, and double the first-class rate was $2.18 per 100 pounds prior to May 14, 1945, and $2.25 per 100 pounds thereafter.

The shipments here involved were described in the bills of lading as "Radio Receiving and Transmitting Sets," "Second Echelon Spares," and "Radio Receiving and Transmitting Sets and Second Echelon Parts." Plaintiff's predecessor first considered this equipment to be classifiable, under the general heading "Drawing Instruments, Optical Goods, or Scientific Instruments," as "Scientific Instruments, N. O. I." This classification carries double the first-class rate and plaintiff collected charges accordingly. The General Accounting Office ruled that it should be classified, under the general heading "Electrical Appliances or Equipment or Parts Named," as "Radio Transmitting and Receiving Sets, Combined," which carries the first-class rate. The difference between the charges collected and those which the General Accounting Office deemed applicable, were deducted from moneys due plaintiff for other transportation.

The total charges received by plaintiff, after deductions by defendant, were $2,847.44. The charges which would have accrued at double the first-class rate are $5,833.78, so that if double the first-class rate is found to be applicable, defendant will be liable to pay the additional amount of $2,986.34.

The applicable ratings for radar equipment, such as was shipped by defendant, were for a long time a subject of discussion between the Department of the Army, the General Accounting Office, and the National Classification Board of the American Trucking Association, Inc. That Board determined applicable ratings on behalf of the motor carriers. On May 20, 1947, the Board attended a demonstration of radar installations conducted by the War Department during which the working parts were shown and the principles involved

explained. Some nine months after this demonstration the Board came to the conclusion, in agreement with the General Accounting Office and the bill of lading descriptions, that the equipment should be classified as "Radio Sending and Receiving Sets, Combined." However, about two weeks after this decision, Mr. Yingling, a member of the Board, and plaintiff's chief witness, wrote to the Freight Branch, Department of the Army, sending copies to the General Accounting Office, to plaintiffs, and to the Weighing & Research Bureau of the American Trucking Association, Inc., stating that the equipment in question was a range and height finder and that double the first-class rate was, therefore, applicable to such shipments. This change of opinion was not based on any further investigation of the actual equipment or of its transportation characteristics, but was based solely on certain definitions and explanations contained in War Department Technical Manuals.

The matter was then further considered by the Board until September 18, 1953, at which time the Board again came to the conclusion that the original classification, "Radio Transmitting and Receiving Sets, Combined," was the proper one. The Board said:

> Recently the full membership of the Board arranged to inspect a very complete Radar installation at one of the nearby Airforce Bases for the purpose of learning at first hand how the equipment is used and of what it consists. We learned that, basically, Radar is a type of radio • • •.
>
> After considering the facts observed and learned, the Board has concluded that Radar receiving equipment should be rated as Radio Receiving Sets. • • •.

It is noted at the outset that the question in this case is one of fact, *i. e.*, under which classification heading of the tariff do radar sets AN/TPL-1 fall. Plaintiff has the burden to show (1) that the classification of this equipment as "Radio Sending and Receiving Sets" under "Electrical Appliances and Equipment" made by the National Classification Board of the American Trucking Association, is wrong and (2) that its classification as either "Range or Height Finders" or "Scientific Instruments, N. O. I.," both appearing under "Drawing Instruments, Optical Goods or Scientific Instruments" is correct.

We believe the plaintiff has failed to meet the burden of proof on both issues. First plaintiff has failed to show that radar should not be classified as radio equipment.

Plaintiff relies upon purported distinctions between radar and radio equipment which the evidence does not sustain. Radar operates on familiar radio principles. Its basic working parts are essentially electronic equipment such as is found in radio and television sets, each of which take the first class rate. National Motor Freight Classification No. 7, C. F. Jackson, Agent MF-I. C. C., No. 14; p. 121 of Exceptions to National Motor Freight Classification No. 7.

The Interstate Commerce Commission has consistently held that the true test for classification purposes is the character of the article shipped. *See Northern Pump Co.* v. *Chicago M. St. P. & P. R. R. Co.*, 190 I. C. C. 421, 422; *Markstein* v. *Missouri Pac. R. Co.*, 243 I. C. C. 345, 348; *Lenen Thread Co., Inc.* v. *Pope & Talbot, Inc.*, 256 I. C. C. 79, 81; *Chemi Products Co.* v. *Springmeier Shipping Co.*, 266 I. C. C. 263, 265.

In all bills of lading prepared by Army personnel, these shipments were described as radio equipment. There is no evidence that the shipments were deliberately described incorrectly and the equipment having been manufactured by the Army according to Army specifications, it would seem that the Army was best qualified to describe the characteristics of it. As was said in *Northern Pump Co.* v. *Chicago M. St. P. & P. R. R. Co., supra,* "we have in numerous cases accepted a manufacturer's description of a commodity for sales purposes as determinative of its identity for transportation purposes."

Moreover, and very important to the determination of this issue, the National Classification Board of the American Trucking Association, after twice fully considering the question of proper classification of radar, came to the conclusion that radar should be rated as radio equipment. This Board is a body set up by the trucking industry specifically for the purpose of creating and interpreting classification schedules, and acts as the representative of the carriers.

Even were the two descriptions and tariffs equally appropriate, the shipper is entitled to have applied the one specifying the lower rates. *United States* v. *Gulf Refining Co.,* 268 U.S. 542, 546.

Secondly, plaintiff has failed to show that radar should be classified either as "Range or Height Finders" or as "Scientific Instruments."

Plaintiff's first contention in this respect is that radar should be considered as "Range or Height Finders." The evidence shows, as found by the commissioner of this court, that a "range finder" is an optical instrument for finding the distance to a target.

The heading "Drawing Instruments, Optical Goods or Scientific Instruments" and the items listed thereunder, "Range or Height Finders" and "Scientific Instruments, N. O. I," shows that those terms as they are used clearly indicate delicate and precise optical instruments. The radar equipment in this case was used merely to detect the presence of an object which may not be visable. Range or height finders are used to give the location of the object and necessarily would encompass delicate and precise optical instruments as well as scientific instruments to find the exact location of objects such as aircraft. The evidence shows that radar is only accurate within 500 yards and the users need not have scientific training. It must be further noted that the evidence shows without contradiction that this radar equipment was not a delicate precision instrument—that it is a field Army type of equipment that has to be transported on its own wheels across country and bumped along like a jeep and contains the same basic electronic components as a piece of field radio equipment.

Plaintiff points to several dictionary and encyclopedia definitions as well as the Army technical manuals upon which it bases its contention that this radar equipment is a range and height finder. However, the question here is not what is the best definition of "Range or Height Finders" but whether this radar equipment fits within the meaning of that term as used for rate fixing purposes in the transportation schedule.

The article as a whole must be looked to and the nature of the article must be looked to rather than its use in determining classification. *Anthony* v. *Director General,* 61 I. C. C. 366, 368; *Simon* v. *Southern Railway,* 102 I. C. C. 326; *Union Smelting & Refining Co.* v.

Pennsylvania Railroad Co., 152 I. C. C. 434, 436; *Lynchburg Iron & Metal Co.* v. *Seaboard Air Line Railway*, 160 I. C. C. 241, 242; *Val Blatz Brewing Co.* v. *Atchison T. & S. F. Railway*, 173 I. C. C. 488, 490; *Lansing Dairy Co.* v. *Wabash Railway*, 185 I. C. C. 599, 600; *Darling & Co.* v. *New York, C. & St. L. R. Co.*, 213 I. C. C. 418, 422.

Therefore, it must be concluded that considering the underlying transportation characteristics involved, these radar sets are electronic equipment very similar to radio in principle and in their essential parts, and the classification made by the National Classification Board is proper. The first class rate applicable to radio is the proper charge to be made on these shipments.

Plaintiff's petition is dismissed.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

* * * * * * *

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is not entitled to recover, and the petition is therefore dismissed.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 880

BUCH EXPRESS, INC., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Government respectfully calls the attention of the Court to the following facts, which suggest that the petition was filed out of time:

On July 12, 1955, the Court of Claims entered judgment for the United States dismissing the petition filed in that court. A motion for new trial was filed on September 12, 1955, but overruled on November 8, 1955 (R. 154). On January 6, 1956, petitioner, within an extended period of time allowed by the court below, filed a second motion

entitled "Plaintiff's Motion for Reconsideration of Order Over-Ruling the Plaintiff's Motion of September 12, 1955 for a New Trial, for Amendment of the Findings of Fact, and for Rehearing of the Issues Involved in the Decision and Judgment Herein—Request for a Limited Rehearing on Technical Electronics Issue" (R. 155). On January 20, 1956, the court below overruled this second motion without more (R. 155). The petition for a writ of certiorari was filed 90 days later, on April 19, 1956.

Since the petition for certiorari was filed more than 90 days after the entry of the final judgment, it is apparent that the petition was not filed within the time specified by 28 U.S.C. 2101(c) unless the second motion, filed on January 6, 1956, tolled the running of the statutory period. There is no doubt that the running of the 90-day period is postponed by the timely filing of any of the three motions which may be filed as of right after judgment in the Court of Claims, *i.e.*, "a motion for a rehearing or a motion to alter or amend a judgment or a motion to grant a new trial." Rule 53(c) of the Court of Claims. The first motion, filed on September 12, 1955, was such a motion and did toll the running of the 90-day period until November 8, 1955, when the motion was overruled. However, the second motion, filed on January 6, 1956, was not such a motion. To the contrary, it was a motion for reconsideration of the November 8, 1955 order and sought, in addition, "A limited rehearing on technical electronics issue." Obviously, such a

motion, not filed as of right but necessarily addressed to the discretion of the court, can "not suspend the running of the ninety days" unless it is considered on its merits. *Morse* v. *United States*, 270 U.S. 151, 154. There is nothing to show that it was so considered.

Petitioner, therefore, cannot escape the statutory requirement by attempting to treat the date of the overruling of its second motion on January 20, 1956 as the beginning of a new 90-day period.

It is respectfully submitted that the petition for certiorari should be denied for the foregoing reasons.[1]

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MAY, 1956.

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[1] Should this Court be of the opinion that the petition for certiorari was timely filed, it is respectfully submitted (1) that the only question in this case, as the opinion of the court below states, "is one of fact, *i.e.*, under which classification heading of the tariff do radar sets AN/TPL-1 fall" (Pet. App. B, p. 25), (2) that the petition asserts neither the type of conflict of decisions nor any novel or important question warranting further review, and (3) that all of the petitioner's arguments on the merits are fully answered in the opinion of the court below.

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